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In The

Supreme Court of the United States

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

On Writ Of Certiorari To The Wisconsin Court Of Appeals, District IV

BRIEF FOR THE STATE BAR OF WISCONSIN'S ELDER LAW SECTION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Elder Law Section of the State Bar of Wisconsin ("ELS-W") is a voluntary membership organization of more than 800 attorneys who work in private practice, public interest/legal service organizations, and government agencies providing services to the elderly. Elder law is an interdisciplinary practice that draws on many legal and extralegal subject areas to help senior citizens. Betsy Abramson, et al., *Advising Older Clients and Their Families* §§1.10, 1.14-1.16 (1997). ELS-W seeks to improve " . . . laws affecting the elderly by commenting, where appropriate, on proposed state and federal legislation and by participating in litigation involving elder law issues, including the preparation and filing of amicus briefs in appellate cases. . . . " Bylaws Art. I, §2 (March 2001). ELS-W has a compelling interest in assuring that community spouses and nursing home widows fully benefit from the spousal impoverishment protections Congress requires of the states. Only the "resource first" mandate upheld in *Blumer v. Wisconsin Department of*

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[1] Petitioner and Respondent consented to the filing of this brief *amicus curiae*. The consents have been filed with the Clerk of this Court. No part of this brief has been authored by counsel for either party. Submission of this *amicus curiae* brief supporting Mrs. Blumer was authorized by unanimous votes of the ELS-W board and, subsequently, the State Bar of Wisconsin's Board of Governors on September 7, 2001. The brief is submitted by only the ELS-W, not the entire State Bar. It has been prepared by Section members *pro bono* as required by State Bar Bylaw Art. VII, §2.(c)3. ELS-W may only pay for the costs of printing and filing the brief. No persons other than the *amicus curiae*, or its members or counsel made any monetary contribution to the preparation and submission of this brief.

Health and Family Services, 237 Wis.2d 810, 615 N.W.2d 647 (Ct. App. 2000) preserves property income for community spouses that "income first" displaces with disappearing income. Our collective experience is helpful to the court because ELS-W has some years of experience under both methods. Wisconsin has been a "resource first" state twice. The "income first" sentence in Wis. Stat. §49.455(8)(d) (1999-2000) invalidated in July 2000 by the Court of Appeals was added to the statute in August 1993.[2] ELS-W submits this brief to ensure the promise of preventing spousal impoverishment becomes a reality for elderly persons whose deceased wives and husbands needed costly long-term care.

SUMMARY OF THE ARGUMENT

The Wisconsin Court of Appeals correctly held the plain language of 42 U.S.C. §1396r-5(e)(2)(C)[3] in the spousal impoverishment section mandates "resource first" within the context of the Social Security Act. The "income first" method combines the incomes of both spouses to meet community spouses' needs, forcing assets to be used up before Medicaid provides financial assistance.

[2] Wis. Stat. §49.455(8)(d) (1999-2000) changed from "resource first" to "income first" effective August 12, 1993. 1993 Wis. Act. 16, §1403m. *Blumer* became binding prospectively when its publication was ordered on July 26, 2000. Unless otherwise indicated, all references to Wisconsin Statutes are to the 1995-96 version.

[3] All references to the United States Code are to the 1994 version, the pertinent sections of which remained substantially unchanged at the time of Mrs. Blumer's 1996 application.

"Resource first" uses property income to close the gap between community spouses' own incomes and the State's Minimum Monthly Maintenance Needs Allowance (MMMNA) set within the parameters of 42 U.S.C. §1396r-5(d)(3).

Petitioner Wisconsin Department of Health and Family Services (WDHFS) and its supporting *amici* concede the plain meaning of a "community spouse's income." They now argue the United States Department of Health and Human Services (HHS) has authority under 42 U.S.C. §1396a(a)(17) to deem a post-eligibility support allowance from an institutionalized spouse's income to a community spouse during the initial eligibility determination. The amount of the transfer under the invalidated Wisconsin statute, Wis. Stat. §49.455(8)(d), cannot be determined, however, without first separately attributing income to each spouse.

This new argument ignores that Congress had already dictated, in other Medicaid statutes, that the baseline categorical programs would control what income is considered for spousal impoverishment eligibility determinations. 42 U.S.C. §1396r-5(a)(3). In this State, like most others, Supplemental Security Income (SSI), Title XVI of the Social Security Act, classified as 42 U.S.C. §§1381, *et seq.* is the applicable baseline program. Those other Medicaid statutes specifically require attributing income to each spouse using SSI's name on the check rule, just as the hearing examiner did here. Pet.-Ap. 25a, Findings of Fact ¶7. Congress went a step further and made sure HHS and the states would not be confused about which rules apply when it superseded 42 U.S.C.

§1396a(a)(17) for spousal impoverishment cases. 42 U.S.C. §1396r-5(a)(1).

Usually, one of two Medicaid statutes governs income eligibility for spousal impoverishment cases, depending on a state's chosen options and the institutionalized spouse's income. The more commonly applicable method compares the institutionalized spouse's income to a special income level, technically set by the rules of a categorically needy option at 42 U.S.C. §1396a(a)(10)(A)(ii)(V). For those whose income is above the special income level, a medically needy test is applied, comparing income, per 42 U.S.C. §1396a(a)(10)(C)(i)(III), with medical expenses.

Both Medicaid statutes require using SSI's name on the check rule, without any deduction for spousal support, to decide an institutionalized spouse's income for Wisconsin's spousal impoverishment eligibility decisions. The special income level rule of 42 U.S.C. §1396a(a)(10)(A)(ii)(V) governs the determination of Mrs. Blumer's income for spousal impoverishment eligibility purposes. It specifies, by reference to 42 U.S.C. §1396b(f)(4)(C), that Mrs. Blumer's income must include all income attributed to her by 42 U.S.C. §1382a, the SSI statute defining income according to the name on the check rule. Thus, the Medicaid statute governing Mrs. Blumer's income for eligibility purposes prohibits reducing her income to fund a post-eligibility transfer to her husband before his resource allowance is increased in a §1396r-5(e)(2)(C) eligibility hearing. Similarly, income during Medicaid's eligibility phase for the medically needy also starts with SSI counted income, without any deduction for post-eligibility spousal maintenance. 42 U.S.C. §1396a(a)(10)(C)(i)(III); *compare* 42 C.F.R. §435.831 (governing income eligibility) and §435.832(b) (post-eligibility spousal maintenance deduction).

No income can be deemed away from Mrs. Blumer or support allowance deducted from her income for Medicaid eligibility purposes because SSI statutes and regulations do not permit an applicant's income to be reduced by spousal support. They also allow no deeming from a potentially eligible applicant to her community spouse. Even where a garnishee deducts court-ordered support payments from applicants' checks, or a pension plan is ordered to pay a community spouse under a qualified domestic relations order, that income continues to be attributed to the institutionalized spouse for eligibility purposes. 20 C.F.R. §416.1123(b)(2). *Estate of G.E. v. Div. of Med. Assist.*, 638 A.2d 833, 835-836 (N.J. Super. App. Div. 1994); *following Himes v. Shalala*, 999 F.2d 684, 688-91 (2d Cir. 1993). Income deductions for Medicaid's eligibility and post-eligibility phases are separately authorized; there is no authority or precedent for authorization in one phase to create a deduction in the absence of separate authority for the other. *LaMore v. Ives*, 977 F.2d 713 (1st Cir. 1992).

When Congress set out to solve the problem of spousal impoverishment, it wanted to make sure all couples paid their fair share. 121 Cong. Rec. H6483 (daily ed. July 22, 1987) (statement of Rep. Tauke). Variations across the states in allowable state policies, Medicaid options, and state administration contributed to unequal sharing of nursing home costs by couples of similar economic means. H.R. Rep. 105(II), 100th Cong., 2d Sess. 4, at 65-69,

73, 76 (1987), *reprinted in* 1988 U.S.C.C.A.N. 857, 888-92, 896.

To assure all couples paid their fair share, regardless of where they lived, Congress created many uniform rules within the spousal impoverishment statute section itself. 42 U.S.C. §1396r-5, created by the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), §303, Pub. L. No. 100-360, 102 Stat. 683. It also created 42 U.S.C. §1396a(r)(2) and amended the medically needy comparability requirement at §1396a(a)(10)(C)(i)(III). MCCA, §303(e), 102 Stat. 754, 763. All of §303 was aimed at the "[p]rotection of income and resources of [a] couple for maintenance of [a] community spouse." MCCA, 102 Stat. 684, 754.

Whenever Congress intends to change the Medicaid laws in a way that alters the settled and basic conditions under which federal funds are granted to the states, it must do so plainly and unambiguously. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981); *Mowbray v. Kozlowski*, 914 F.2d 593, 598-601 (4th Cir. 1990). Accordingly, the *Mowbray* Court held the new comparability requirements did not override other Medicaid statutes linked to the categorical baselines, adopting the interpretation of HHS, also a party to the litigation. *Mowbray*, 914 F.2d at 601.

The Medicaid statute applicable to Mrs. Blumer classifies her as categorically needy and at §1396b(f)(4)(C) unambiguously proscribes any reduction of her income that would otherwise be included under SSI baseline

rules for eligibility purposes. It is well-settled an applicant's income as defined for categorical Medicaid eligibility in an SSI state may not be reduced by a post-eligibility spousal support transfer. Congress has not altered these rules. Even if "the community spouse's income" as used in §1396r-5(e)(2)(C) were ambiguous, which it is not, it would remain unchanged because its definition lies in the statute limiting the extent of federal financial participation in state Medicaid programs and is, itself, linked to the baseline categorically needy rules.

Congress understood that if nursing home widow(er)s could keep more income from assets, they would have less need for welfare and more choices for their own long term care needs. 121 Cong. Rec. H6478 (daily ed. July 22, 1987) (statement of Rep. Panetta); 121 Cong. Rec. S15125 (daily ed. October 27, 1987) (statement of Sen. Reid). Congress intended the spousal impoverishment provisions to eliminate the choice between the poor house and court house married persons faced when confronted by their spouses' needs for nursing home care. 121 Cong. Rec. H6475 (daily ed. July 22, 1987) (statement of Rep. Waxman). Some ruined their own health trying to keep a spouse at home. Many sought support orders, divorces or bankruptcy to avoid impoverishment, leaving the nursing homes to write off uncollectible accounts.

In the long run, preserving a community spouse's property income today will help tomorrow's frail elderly widow(er) pay his or her own way. Congress took the long view when it linked the Minimum Monthly Maintenance Needs Allowance (MMMNA) to the poverty line

for two in 42 U.S.C. §1396r-5(d)(3) and mandated transferring resources first under §1396r-5(e)(2)(C) within the spousal impoverishment provisions.

Wisconsin's experience shows the goal of ending spousal impoverishment, while treating couples fairly, can be realized with negligible impact on the State and Wisconsin's nursing home industry. In the fourteen months (August 2000 through September 2001) since Wisconsin law changed back to "resource first," our analysis of Petitioner's public records identified 10 resulting Medicaid cases. On an annual basis, these cases cost Wisconsin's Medicaid budget (federal and state funds) about $240,000 and Wisconsin's nursing homes about $88,560.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD CONGRESS, BY PLAIN AND UNAMBIGUOUS LANGUAGE, DID NOT MEAN A COUPLE'S COMBINED INCOME WHEN IT USED "COMMUNITY SPOUSE'S INCOME" IN §1396r-5(e)(2)(C); IT MEANT ONLY ONE SPOUSE'S INCOME AND IT TOLD US WHICH SPOUSE IT MEANT.

A. A "Community Spouse's Income" in the Context of the Spousal Impoverishment Provisions and the Social Security Act Includes No One Else's Income.

Whether income belongs to the institutionalized applicant or that applicant's community spouse, referred to as the non-institutionalized spouse before MCCA, has always been unambiguous. *Schweiker v. Gray Panthers*, 453

U.S. 34, 39-40, 50-51, 54-55 (1981); *Herweg v. Ray*, 455 U.S. 265, 267-68 (1982). The duration over which HHS and the states could impute income from the applicant to his or her spouse was the issue. *Id.* By asking this Court to decide whether HHS and the states may employ reverse deeming, Petitioner WDHFS and its supporting *amici* concede the plain meaning of a "community spouse's income." They assume all readers will consistently understand the "institutionalized spouse's income" and the "community spouse's income" or variants thereof when they repeatedly use these terms. For example:

> The question in this case is whether . . . a State may first consider whether the institutionalized spouse could transfer [her] income to the community spouse and thereby bring [the community spouse's] income up to the level set by the statute to meet his monthly needs, making it unnecessary to protect additional resources.

Brief of the United States at 2 (filed September 2001). This necessarily means they must separately attribute the income to each spouse before they can decide how much of the applicant's income may be deemed available for transfer to his or her spouse. Plainly and simply, a community spouse's income is the income possessed by the community spouse using the "name on the check" rule. That rule is also incorporated in §1396r-5(b)(2). Petitioner's Brief at 17, State Agencies' Brief at 11-13, 15. When the "name on the check" rule is applied during the eligibility phase, the statute precludes "income first," leaving "resource first" the Congressional mandate. *Id.* By claiming the Wisconsin Court of Appeals improperly borrowed the "name on the check" rule from

§1396r-5(b)(2), the United States concedes "resource first" is mandated if a "community spouse's income" plainly means the community spouse's name is on the check or title. Brief of the United States at 13, 24.

B. HHS and Wisconsin have no authority to deem income from Mrs. Blumer, the eligible institutionalized spouse, to Mr. Blumer, the ineligible community spouse.

1. Congress rendered 42 U.S.C. §1396a(a)(17) inapplicable to spousal impoverishment cases.

The claim that §1396a(a)(17) gives HHS and the States authority to rewrite the spousal impoverishment law is directly contradicted in that statute section. Congress superseded §1396a(a)(17) by exact citation as *per se* inconsistent with the spousal impoverishment section. §1396r-5(a)(1). Accordingly, when Congress wanted §1396a(k)'s trust income deeming rules to apply under spousal impoverishment, it expressly cross-referenced subsection (a)(17) even though §1396a(k) also cited (a)(17). *See* §1396r-5(b)(2)(B)(i) as enacted by MCCA §303(a), 102 Stat. 755.[4] The spousal impoverishment

[4] §1396r-5(b)(2)(B)(i) said: "In the case of a trust – (i) . . . income shall be attributed in accordance with the provisions of this title [Medicaid] (including 1902(a)(17) and 1902(k) [42 U.S.C. §1396a(a)(17) and (k)], and. . . . " Subsection (k) of 1396a is reproduced at App., *infra*, 1. It said, in relevant part : "(1) In the case of a medicaid qualifying trust . . . , the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17) of this section,. . . . " It was later replaced by §1396p(d) with the cross-reference in §1396r-5(b)(2)(B)(i) conformed. OBRA 1993, Pub. L. 103-66, §13611(d)(1)(C), 107 Stat. 627.

section contained one other instance where a cross-referenced Medicaid statute contained its own reference to §1396a(a)(17). In that case, §1396r-5(d)(1)(D) referred to §1396a(r)(1) which separately defined medical expenses for spousal impoverishment cases by a reciprocal reference back to §1396r-5(d)(1)(D).[5] That reference back to §1396r-5(d)(1)(D) would have been unnecessary if Congress had only partially superseded §1396a(a)(17) on inconsistency grounds.

Petitioner and its *amici* also argue the states have broad discretion to set their own spousal deeming rules inherent in the "reasonable standards" state Medicaid plans must include under §1396a(a)(17). Brief of the United States at 2, Brief of State Agencies at 8, Brief of Petitioner at 37. Medicaid and SSI statutes, other than §1396a(a)(17), specify the income standards that uniformly measure applicants' need for eligibility. *See Schweiker v. Hogan*, 457 U.S. 569, 581-89 (1982) (holding the income limits of §1396b(f) cap the single income standard used to test for medically needy eligibility under §1396a(a)(17)). The standards are not something used by HHS to judge whether a state-devised eligibility test is reasonable. Nor are there several amorphous standards subject to state discretion or HHS interpretation. Only a single medically needy income standard (i.e., cap) may be

[5] §1396r-5(d)(1)(D) referred to section 1902(r)[now §1396a(r)(1)]. MCCA §303(a), 102 Stat. 757. Section 1902(r), itself added at §303(d), states it was defining medical expenses "[f]or purposes of sections 1902(a)(17) and 1924(d)(1)(D) [42 U.S.C. §1396a(a)(17) and §1396r-5(d)(1)(D) . . . with respect to the post-eligibility treatment of income of individuals. . . . " 102 Stat. 762.

set. §1396a(a)(10)(C)(i)(III); *See* also State Medicaid Manual (SMM) §3240.5, HCFA Transmittal 58 (Aug. 1991) (App., *infra*, 5-6). It is well-established income deeming and court-ordered spousal support are not standards. *Atkins v. Rivera*, 477 U.S. 154, 163-166 (1986); *Glosenger v. Perales*, 639 N.E.2d 1127, 1129 (N.Y. 1994).

2. Wisconsin's categorical baseline dictates applying SSI rules to the Blumers.

Medicaid statutes, other than §1396a(a)(17), apply the SSI income rules to Mrs. Blumer's eligibility determination. §1396r-5(a)(3), 42 C.F.R. §435.401. For spousal impoverishment income eligibility, states are to "use plan policies not governed by §1924 [42 U.S.C. §1396r-5] to define ownership in income.", *See* SMM §3261.1, HCFA Pub. 45-3 Transmittal 39 (Oct. 1989). (App., *infra*, 3). The applicable provisions depend on the state's chosen categorical baseline and coverage groups.

Wisconsin has chosen SSI as its categorical baseline for the elderly (those age 65 and over), disabled and blind. Wis. Stat. §49.46. States may choose to follow either the federal SSI rules or their own less generous 1972 welfare rules by exercising the so-called 209(b) option, set forth at 42 U.S.C. §1396a(f). *Mowbray v. Kozlowski*, 914 F.2d 593 (4th Cir. 1990). The eleven 209(b) states, as of April 7, 1995, were Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma and Virginia. POMS SI 01715.010.A.1., last updated Feb. 16, 2001 (*available at* http:/policy.ssa.gov/poms.nsf).

When Congress used the categorical baseline for spousal impoverishment's income eligibility test, it plainly and unambiguously preserved categorical income exclusions, even those that HHS and states may choose to ignore for post-eligibility cost-sharing purposes under §1396a(a)(17). *LaMore v. Ives*, 977 F.2d 713, 715-16, 719 (1st Cir. 1992). The disabled veterans aid and attendance benefit at issue in *LaMore* illustrates deductions for the eligibility and post-eligibility phases are separately authorized. An SSI regulation, 20 C.F.R. §416.1103, excluded the benefit from income for Medicaid's eligibility test, even though it was income available to pay medical expenses after they were eligible. *Id.* Accordingly, no state may deviate from its 209(b)/SSI baseline rules for determining a community spouse's income during the eligibility phase if doing so results in the applicant spouse's ineligibility. *Id.*, §1396a(r)(2), 42 C.F.R. §§435.401, 435.601.

Medicaid's income eligibility rules for the categorically needy (as expanded by state option) and the medically needy apply to Wisconsin's spousal impoverishment cases. To determine which rules govern Mrs. Blumer's spousal impoverishment income eligibility, her countable SSI income as the institutionalized applicant must be below the income standard for the group. Three income standards are applicable:

a) the federal SSI benefit rate for an applicant without an eligible spouse to decide whether she is categorically needy (SSI eligible) under §1396a(a)(10)(A)(i);

b) the special income level for institutionalized persons or persons receiving waiver services to

divert them from institutionalization, set by the State at no more than 300% of the federal SSI benefit rate[6] per §1396b(f)(4)(C), to determine whether she is categorically needy under §1396a(10)(A)(ii)(V) or (VI); or

c) if her medical expenses exceed her income above the uniform medically needy standard of §1396a(a)(10)(C)(i)(III), as medically needy thereunder. 42 C.F.R. §§435.811, 435.831, SMM §3261.1 (App., *infra*, 3).

The medically needy income test includes a medical expense spend-down, but the special income level does not. Even one dollar of income above the special income level bars eligibility. *Estate of G.E. v. Div. of Med. Assist.*, 638 A.2d 833 (N.J. Super. App. Div. 1994).

The applicant's SSI countable income is determined in the same way for medically needy and SSI categorical eligibility. §1396a(10)(C)(i)(III). Wisconsin expressly links its medically needy income eligibility rules to the federal SSI statutes by defining income as earned and unearned income " . . . that would be included [or excluded] in determining eligibility for the aged, blind or disabled individual under 42 USC 1381 to 1385." Wis. Stat. 49.47 (4)(c) (1999-2000).[7] For the special income level test, the

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[6] Optionally categorically needy eligibility, per 42 U.S.C. §1396b(f)(4)(C) is applicable to an individual whose income " . . . (as determined under section 1382a of this title [SSI], but without regard to section (b) thereof) does not exceed 300 percent of the [SSI] benefit rate. . . . "

[7] The definition of income contained in this statute has been the same for SSI-related applicants since at least 1979. *Swanson v. Health & Social Services Dept.*, 105 Wis.2d 78, 80 n.2,

Medicaid statute itself requires the institutionalized applicant's income to be determined under 42 U.S.C. §1382a [SSI] without subtracting the SSI income exclusions in §1382a(b).[8]

3. The first step in determining Mrs. Blumer's income eligibility was to apply SSI's name on the check rules to separate the Blumers' incomes, which is what the hearing examiner did.

SSI and, therefore, Medicaid treats each spouse's income separately, using the name on the check rule for eligibility determinations. §§1382(a), 1382a; 20 C.F.R. §§416.1102, 416.1123(b)(4), 416.1160(c)(1). The next step would have been to deem Mr. Blumer's income to his wife because he is an ineligible spouse. §1382c(f)(1); 20 C.F.R. §416.1160(c)(2) and (3). But this income deeming rule is inapplicable. §1396r-5(b)(1).

The hearing examiner used the name on the check rule to determine Mrs. Blumer's income before deductions. That income included the Social Security and pension checks she received in her own name, $926.99 and $335.72, respectively, for a total of $1,262.71. Pet.-Ap. 25a, Findings of Fact 7. Mr. Blumer's income of $1,702.45 was determined in the same manner. *Id.*

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312 N.W.2d 833 (Ct. App. 1981), *rev. denied*. This decision also holds only paid medical expenses may be deducted from income during the spend-down period to eliminate excess income barring medicaid eligibility as a matter of federal law, 42 U.S.C. §1396a(a)(17). *Swanson*, 105 Wis.2d at 82-84.

[8] See note 6, supra.

When Mrs. Blumer applied for benefits in 1996, the federal SSI benefit rate for one person was $470. *Advising Older Clients*, §9.62; Wis. Stat. §49.77(2) (1999-00). The special income level was three times that amount or $1,410 because Wisconsin uses the maximum level set by §1396b(f)(4)(C). Wis. Stat. §§49.43(1e), 49.46(1)(e).

Mrs. Blumer's income of $1,262.71 is between the SSI benefit rate of $470 and the $1,410 special income level, so she is income eligible in the categorically needy group, as expanded by state option. Wis. Stat. §§49.46(1)(e), 49.47(4)(c)3. Therefore, the income eligibility rules of §1396b(f)(4)(C)[9] control how her income and that of her husband are defined for the resource allocation increase under §1396r-5(e)(2)(C).

4. Because SSI rules do not recognize spousal support needs or permit reverse deeming to ineligible spouses, Medicaid statutes prohibit the transfers required by "income first."

"Income first" is permissible only if Wisconsin has discretion to transfer some of Mrs. Blumer's income to her ineligible community spouse as a support allowance during the eligibility phase. As we have just seen, the Medicaid statutes dictate, plainly and unambiguously that Mrs. Blumer's income for eligibility purposes must: be determined by SSI's name on the check rule, §1382a; and, may not have any of the SSI income exclusions,

[9] See note 6, supra; *Schweiker v. Hogan*, 457 U.S. 569, 575-76 (1982).

which are listed in §1382a(b) deducted from it. §1396b(f)(4)(C); 42 C.F.R. §435.1005. Even if that were not the case, there is no SSI deduction for support of a spouse in arriving at SSI countable income for income eligibility tests. Therefore, "income first" is not permitted under Medicaid statutes applicable to Mrs. Blumer. Even if Mrs. Blumer were eligible as medically needy, the same rules would apply. *Compare* 42 C.F.R. §435.831 (governing income eligibility) and §435.832(b) (post-eligibility spousal maintenance deduction).

No spousal support, even court-ordered support, may be excluded from SSI countable income for Medicaid eligibility purposes. The income of an institutionalized applicant like Mrs. Blumer includes support or alimony payments received by her, 42 U.S.C. §1382a(a)(2)(E), 20 C.F.R. §416.1121(b)(3), but may not be reduced for support she owes or pays her spouse for his maintenance needs, §416.1124.[10] Even where a payroll or pension check garnishment deducts court-ordered support payments from the applicant's checks before income is received, that garnished income continues to count for eligibility purposes. 20 C.F.R. §416.1123(b)(2). *Estate of G.E.*, 638 A.2d at 835-36 (so holding for a pension check paid to the community spouse under a qualified domestic relations order); *Himes v. Shalala*, 999 F.2d 684, 688-91 (2d Cir. 1993) (so holding for child support); *Tyrrell v. Sullivan*, 972 F.2d 252, 256 (8th Cir. 1992) (holding child support and spousal support must be treated comparably).

[10] There is no explicit income disregard as there is for ineligible spouses whose incomes are being deemed to their eligible spouses under §1382c(f)(1). 20 C.F.R. §416.1161(a)(10).

Similarly, SSI does not authorize reverse deeming from an eligible institutionalized spouse to an ineligible community spouse. For SSI eligibility, reverse deeming only occurs if both spouses are eligible for benefits. §1382(a)(2). For eligible couples, SSI combines the incomes of an eligible individual with an eligible spouse to decide an eligible couple's benefit. §1382(b)(2), 20 C.F.R. §§416.1802, 416.1806. Before MCCA, the Medicaid rules incorporated 209(b)/SSI deeming rules that operated in the same way. *Gray Panthers*, 453 U.S. at 38-40; *Herweg*, 455 U.S. at 267-270.[11] SSI's income deeming rules and those governing spousal support orders control for Medicaid income eligibility testing. *Atkins v. Rivera*, 477 U.S. 154, 163-166 (1986).

Even if Congress had not superseded §1396a(a)(17), reducing the applicant's income by a maintenance allowance for an at-home spouse cannot occur until the post-eligibility rules apply to medically needy cases. 42 C.F.R. §435.832(b)(2). The Medicaid deduction is limited to the lowest level that would disqualify the applicant's spouse from SSI or a 209(b) state's welfare assistance and, thereby, from Medicaid. *Id.* In other words, this post-eligibility transfer of income allows just enough income to be deemed to the at-home spouse to prevent that otherwise *eligible* spouse from remaining income eligible. If this occurred at the eligibility stage, the income would

[11] The earlier cases dealt with how long income deeming could continue, but refused to find the time limits compelled by the 209(b)/SSI deeming rules for eligibility purposes. *Herweg v. Ray*, 455 U.S. at 276. Subsequent legislative action settled the question, leaving only post-eligibility spend-downs for medical care within HHS' purview. *Atkins*, 477 U.S. at 163-166.

be transferred back and forth between the spouses endlessly, making it impossible to determine if either of them is eligible.

5. "Income first" also violates Medicaid's comparability and financial participation requirements.

Reverse income deeming by spousal support transfer is governed by Medicaid's comparability requirement at 42 U.S.C. §1396a(r)(2). *Glosenger v. Perales*, 639 N.E.2d 1127, 1129 (N.Y. 1994), *citing Atkins v. Rivera*, 477 U.S. 154, 163-166 (1986). It gives states some flexibility, but subject to limits. First, states may not exceed the limits on federal financial participation in 42 U.S.C. §1396b(f). *Schweiker v. Hogan*, 457 U.S. 569, 575-76 (1982). Then, within that constraint, states must uniformly apply categorical income methodologies (SSI's income rules in Wisconsin) to spousal impoverishment eligibility determinations. 42 U.S.C. §1396a(r)(2). *See Mowbray v. Kozlowski*, 914 F.2d 593, 601 (4th Cir. 1990); State Medicaid Manual §3240.4 and .5, HCFA Transmittal 58 (Aug. 1991) (App. *infra*, 4-7).

When Congress set out to solve the problem of spousal impoverishment, it wanted to make sure all couples paid their fair share. 121 Cong. Rec. H6483 (daily ed. July 22, 1987) (statement of Rep. Tauke). Variations across the states in allowable state policies, Medicaid options, and state administration contributed to unequal sharing of nursing home costs by couples of similar economic means. H.R. Rep. 105(II), 100th Cong., 2d Sess. 4 at 65-69, 73, 76 (1987), *reprinted in* 1988 U.S.C.C.A.N. 857, 888-92, 896.

To assure all couples paid their fair share, regardless of where they lived, the MCCA specified uniform rules in 42 U.S.C. §1396r-5. It also created §1396a(r)(2) and amended the medically needy comparability requirement at §1396a(a)(10)(C)(i)(III). MCCA 1988, §303(e), 102 Stat. 754, 763. All of these provisions were aimed at the "[p]rotection of income and resources of [a] couple for maintenance of [a] community spouse." MCCA 1988, §303, 102 Stat. 684, 754.

> This bill establishes a uniform national spousal protection policy that applies in all States, whether they are 'SSI,' '209(b),' 'medically needy,' or 'special income level' States, and whether they are community property jurisdictions. [States should be allowed to be more generous but] . . . should not have the discretion to apply methodologies under their *medically needy programs* that are more restrictive – i.e., less generous from the applicant's standpoint – than those under SSI. [emphasis, added.]

H.R. Rep. 105(II), 100th Cong., 2d Sess. 4 at 69, 74-75 (1987), *reprinted in* 1988 U.S.C.C.A.N. at 892, 897-98. Despite agreement by the Senate, the Conference Committee decided to extend " . . . its application to States which offer coverage to optionally categorically needy individuals and to '209(b) states' as well." H.R. Conf. Rep. 100-661, 100th Cong., 2d Sess. at 145, 264, 268 (1988), *reprinted in* 1988 U.S.C.C.A.N. 923, 1042, 1046. This change appeared to conflict with other Medicaid statutes that dictated the baseline categorical programs controlled Medicaid income and resource methodologies. *Mowbray v. Kozlowski*, 914 F.2d 593, 594 (4th Cir. 1990).

Whenever Congress intends to change the Medicaid laws in a way that alters the settled and basic conditions under which federal funds are granted to the states, it must do so plainly and unambiguously. *Mowbray*, 914 F.2d at 598-601 (4th Cir. 1990); *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). The *Mowbray* Court held MCCA's new comparability requirement, §1396a(r)(2), had not repealed the so-called §209(b) option by mandating SSI as the categorical baseline for Medicaid eligibility in all states. The 209(b) option, at 42 U.S.C. §1396a(f), allows states to link Medicaid categorically needy eligibility to their more restrictive 1972 welfare programs in lieu of SSI. *Mowbray*, 914 F.2d at 595-596.

In its ruling, the Court held §1396a(r)(2) did not override other Medicaid statutes requiring categorical baseline rules to be followed, adopting the interpretation of the HHS, a party to the litigation. *Mowbray*, 914 F.2d at 601. It is well-settled an applicant's income as defined for categorical Medicaid eligibility in an SSI state may not be reduced by a post-eligibility spousal support transfer as discussed previously. In this case, §1396b(f)(4)(C) unambiguously proscribes any reduction of Mrs. Blumer's income that would otherwise be included under SSI baseline rules before her eligibility has been determined, as a specified limit on federal financial participation. Congress has not altered this rule.

Even if "the community spouse's income" as used in §1396r-5(e)(2)(C) were ambiguous, which it is not, it would remain unchanged. Its definition lies in the statute limiting the extent of federal financial participation in state Medicaid programs and is, itself, linked to the baseline categorically needy rules. In other words, as to the

question before this Court, the categorical baseline is inviolate. This is borne out in regulations later promulgated by HHS. 42 C.F.R. §§435.1005, 435.601.

Beyond Congressional desire for uniformity, the reason states cannot alter the baseline categorically needy rules is simple. HHS and the states may be able to control some rules for Medicaid, but they do not control the baseline rules. If the baseline is SSI, the rules are controlled by SSI statutes and the Social Security Administration. If the baseline is 209(b), the rules are controlled by the federal and state laws in effect before 1972. A state is permitted to develop a more generous approach only if it could not cause others to lose their categorical eligibility or exceed the limits on federal financial participation. Otherwise, it may not do so because neither states nor HHS have the power to adjust those rules. Only Congress may do so and it did not here.

II. TRANSFERRING "RESOURCES FIRST" TO RAISE THE COMMUNITY SPOUSE'S INCOME UNDER §1396r-5(e)(2)(C) FAIRLY DELIVERS THE PROMISE OF PREVENTING SPOUSAL IMPOVERISHMENT AT ALMOST NO COST TO WISCONSIN OR ITS NURSING HOME INDUSTRY.

A. Only "Resource First" Meets the Purposes of Ending Spousal Impoverishment and Ensuring All Couples Pay Their Fair Share.

The MCCA was intended to end the impoverishment of community spouses in a way that ensured all would pay their fair share. 121 Cong. Rec. H6483 (daily ed. July

22, 1987) (statement of Rep. Tauke). Then existing rules treated couples of similar means inequitably if one spouse held title to all the resources and income. H.R. Rep. 105(II) at 65-69, 73, 76 (1987), *reprinted in* 1988 U.S.C.C.A.N. at 888-92, 896. If they were titled in the community spouse's name, they could be kept; if the spouse in the nursing home held title, everything had to be spent. H.R. Rep. 105(II) at 66-67, 1988 U.S.C.C.A.N. at 889-90. The post-eligibility cost-sharing rules were part of the problem, but so were the rules for "attributing income and resources." *Id.*

1. "Income first" creates inequities allowing some community spouses to keep income others must spend, based on which spouse is institutionalized.

"Resource first" treats community spouses fairly, no matter the source of couples' incomes. "Income first" disfavors property income, the source least likely to decline over the community spouse's life. Retirement income for those age 65 and over is funded 38% from Social Security benefits, 20% from investment assets, 19% from pensions, and 21% from working. SSA, *Income of the Aged Chartbook 1998*, 22 (June 2000).

Pension income often stops or declines when the pensioner dies. As a result, "income first" creates a new inequity like those Congress sought to end with the MCCA. If the pensioner is the community spouse, the pension income may be kept regardless of how large it is, without any obligation to contribute it to the institutionalized spouse's care. §1396r-5(b)(1) and (d). If the

institutionalized spouse dies first, as usually happens, the pension continues to pay for the rest of the community spouse's life. On the other hand, if the institutionalized spouse is the pensioner, the community spouse must exchange property income for a disappearing pension under "income first." After the institutionalized spouse dies, the pension stops or is severely reduced and the property income is gone.

Many pensions pay no death benefits and many pensions do not keep pace with inflation. Payments to survivors are made only during the first 10 to 15 years after the pension begins. The pensioner's spouse often outlives that period. Mr. Blumer has already outlived the 10 year death benefit guarantee on his wife's pension. (R.4: 65-66, 83-84.) Retired Wisconsin and local government employees have overwhelmingly picked one-life annuities, with 15 years guaranteed, 5 years guaranteed, and even no death benefit at all, over those that provide lifetime survivor benefits after they die. Wis. Dept. of Employee Trust Funds, *Comprehensive Annual Financial Report 1999*, at 75. (App., *infra*, 9-10). Until shortly before the MCCA debates, retiring workers could waive survivorship pensions for their spouses. The Retirement Equity Act of 1984 required pension plans to pay a joint survivor's benefit at 50% of the worker's pension, unless the spouse waives it. Pub. L. 98-397, §203(b) created 26 U.S.C. §417 applicable for all plan years after 1986.

2. Congress took the long view when it used the poverty line for two.

Congress understood that today's community spouse could likely be tomorrow's nursing home resident. 121 Cong. Rec. H6478 (daily ed. July 22, 1987) (statement of Rep. Panetta); 121 Cong. Rec. S15125 (daily ed. October 27, 1987) (statement of Sen. Reid). *See* also App., *infra*, 14. Linking the Minimum Monthly Maintenance Needs Allowance (MMMNA) at §1396r-5(d)(3) to 150% of the poverty level for two people was designed to err on the side of keeping the community spouse out of poverty.

After one spouse dies, income, on average, declines to 40% of the level a couple had. That was true when MCCA was being debated and it is true today. The income of unmarried elderly individuals was 39% of that of married couples in 1984, 40% in 1998. *Income of the Aged Chartbook 1998*, 18. An MMMNA set at 150% of the two-person poverty level declines to the one-person poverty level if the income it protects drops by 49% or more at the institutionalized spouse's death.[12]

By setting the lowest permissible MMMNA at 150% of the poverty level for two, Congress protected enough income to keep the average nursing home widow(er) out of poverty, contrary to the assertions in the Brief of the

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[12] In 2001, the federal poverty guideline for one, $8,590, or $716 per month, is 74% of the guideline for two, $11,610, or $967 per month. 66 Fed. Reg. 10695 (2001). A drop from 150% to 100% of the poverty line for two would occur if the income fell by two-thirds. If that level fell to 74%, it would be at 100% of poverty for one. Seventy-four percent of two-thirds is just under 49%.

United States at 16, 28-29. Keeping the community spouse's income above the poverty level for one person was the goal. H.R. Rep. 105(II) at 76-77, 1988 U.S.C.C.A.N. at 899-900.

Like pension income, Social Security income often declines after one spouse dies. Surviving spouses normally receive benefits ranging from half to two-thirds of the total a married couple received. In cases where one has not been paid for work at home, on the farm, or in a family business, a spousal Social Security check will be set at no more than half of the working spouse's check. 42 U.S.C. §402(b)(2), (c)(3), (q); 20 C.F.R. §404.333. After one dies, the survivor keeps the biggest check, or two-thirds of the total. 42 U.S.C. §402(e), 20 C.F.R. §404.335(d). Where both earned equal benefits on their own, the couple's income will be cut in half at the first death.

Contrary to Petitioner's version of the legislative history, Pet. Brief at 35, the House was not opposed to allocating extra resources to the community spouse for ongoing support. Its court-ordered support provision, now at 42 U.S.C. §1396r-5(f)(3), was intended to allow a resource transfer that would not run " . . . afoul of the transfer of asset prohibitions, even where the effect is to leave the community spouse with countable resources in excess of $48,000 [the maximum the House had otherwise placed on the ~~Community~~ Spouse Resource Share]." H.R. Rep. 105(II) at 73, 1988 U.S.C.C.A.N. at 896.

B. The Impact on the State of Wisconsin and Nursing Homes is Negligible.

Petitioner has speculated about the cost to Wisconsin's Medicaid budget, Pet. for Writ of Certiorari at 20, but has failed to share its actual experience with the Court. The ELS-W analysis of Petitioner's public records suggests the impact is negligible.

We estimate Petitioner approved about 1,000 new Medicaid funded spousal impoverishment cases in 1999. That year, Wisconsin nursing homes had 51,186 new admissions and just under 14% were on Medicaid at admission. *See* WDHFS, *Wisconsin Nursing Homes and FDD 1999* at 29 (Nov. 2000) (App., *infra*, 11-13). Past studies indicate about 14% of nursing home residents have a community spouse.[13] Thus, about 7,200 of the persons admitted by Wisconsin nursing homes in 1999 had a community spouse and of those, about 1,000 were on Medicaid at admission.

Since "resource first" again became the law in July 2000,[14] "resource first" allocations resulted in Medicaid eligibility for 10 of the cases[15] posted on the State's

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[13] Department of Health and Social Services, *Profile of Nursing Home Residents 1994* (Dec. 1995), indicating 20% of nursing home residents were married, Table 4, at 7 (App., *infra*, 16) and 71% of married residents had a spouse living in the community, Table 5, at 8 (App., *infra*, 17). The Department of Health and Social Services was Petitioner's predecessor.

[14] See note 2, infra.

[15] They are among the Medical Assistance Resource Allocation (MRA) decisions decided by the Division of Hearings and Appeals (DHA) and posted at http://dha.state.wi.us/static/.

Internet site through September 30, 2001. These 10 cases were decided over the 14 months "resource first" has been in effect. At the end of September 2001, 32 MRA decisions had been posted for the year, running slightly ahead of 1999, the last full year under "income first." In 1999, 28 MRA cases were decided. DHA Appeals Closed by Hearing, 01/01/99 to 12/31/99 (Apr. 26, 2000). The amount each of these community spouses kept due to the "resource first" allocation is shown in the table at App., *infra*, 8.

On average, each of the 10 community spouses kept an extra $58,000. At Wisconsin's $4,075 average monthly private pay rate for nursing home care (Brief of the American Health Care Association at 28), this results in 14.23 months of accelerated eligibility per case. They are not wealthy people. Perhaps half are retired farmers. Others are married to retired factory and government workers who receive pensions.

"Resource first" accelerates Medicaid eligibility in exchange for a higher post-eligibility cost-share as compared to "income first." The monthly cost (federal and state funds) per case to Wisconsin is $2,000. Petition for Writ of Certiorari at 20. The total annual impact on Wisconsin's Medicaid budget would be $24,000 per month or $240,000. The cost over the 14 plus months of accelerated eligibility for all 10 cases would be less than $360,000, assuming all 10 institutionalized spouses live that long.

According to the American Health Care Association (AHCA), it costs Wisconsin nursing homes $738 for each month of accelerated Medicaid eligibility; the difference between the monthly private pay rate of $4,075 and the Medicaid reimbursement rate of $3,336.90. AHCA Brief at

28. The lost revenues to Wisconsin's nursing homes are $7,380 per month for the 10 cases or $88,560 per year; about $11.34 for each of the 7,808 private pay patients Wisconsin nursing homes admitted in 1999. *Wisconsin Nursing Homes and FDD 1999*, at 29 (App., *infra*, 12). Wisconsin's growing elderly population has not been flocking to nursing homes. Unoccupied beds in Wisconsin nursing homes, rose from 10% in 1994 to 15% in 1999. Wisconsin Legislative Fiscal Bureau, LFB 2001-03 Budget Paper #466, *Nursing Home Reimbursement (DHFS-Medical Assistance)* at 7-8 (June 2001).

When we look at Wisconsin's experience, it is important to remember that today's frail elderly nursing home resident may have been yesterday's community spouse. Other than Social Security, investment assets are the only permanent income source a couple may have that does not disappear after a spouse dies. Most people whose health takes away their ability to live independently want to stay in their own homes or live in someone else's home, if at all possible. Nathalie D. Martin, *Funding Long-Term Care: Some Risk Spreaders Create More Risks than They Cure*, 16 J. Contemp. Health L. & Pol'y, 355, 360-365 (2000). Next, they choose an assisted living or continuing care setting, with a nursing home the choice of last resort. *Id.* They will use their savings to pay for the more desirable and less restrictive settings, hoping they will not last longer than their money. *Funding Long-Term Care, supra* at 365-369. The less money yesterday's community spouse has today, the more Medicaid will pay in the long run.

CONCLUSION

For the reasons argued above, the *Amicus* Elder Law Section of the State Bar of Wisconsin respectfully urges the Court to affirm the decision of the Wisconsin Court of Appeals in all respects.

Respectfully submitted,

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* * *

Subsec. (k). Pub. L. 103-66, Sec. 13611(d)(1)(C), struck out subsec. (k) which read as follows:

> "(k)(1) In the case of a medicaid qualifying trust (described in paragraph (2)), the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17) of this section, is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term 'grantor' means the individual referred to in paragraph (2).
>
> "(2) For purposes of this subsection, a 'medicaid qualifying trust' is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.
>
> "(3) This subsection shall apply without regard to –
>
> "(A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this subchapter;
>
> or

"(B) whether or not the discretion described in paragraph (2) is actually exercised.

"(4) The State may waive the application of this subsection with respect to an individual where the State determines that such application would work an undue hardship."

* * *

3261 GENERAL AND CATEGORICAL ELIGIBILITY REQUIREMENTS 10-89

Spousal Resource Allowances. – The differences in the dollar value of resources protected for community spouses and the value of the resources actually held in the name of community spouses.

Promptly Assess Resources. – Within 45 days from the date of request for an assessment unless delays are due to non-receipt of relevant documentation or verification from the requesting party or a third party (e.g., a bank, an insurance company or brokerage) is received within 45 days of receipt of documentation or verification when persons requesting assessments do not provide necessary information to States timely. States may not use the time standards as a waiting period, or as a reason for not completing assessments within the time frames.

A Support Right. – Pending publication of regulations, a reasonable definition is: The right of institutionalized spouses to receive support from community spouses under State law.

Assigned Support Rights. – Pending publication of regulations a reasonable definition is: An assignment of a support right allowing you to go against community spouses for reimbursement of some or all of the medical care provided to institutional spouses. You must assess your own State laws to determine what laws give rise to support rights and the amount of medical costs community spouses are asked to cover and whether you are limited to seeking support in the amount community spouses' resources exceed spousal allowances.

Undue Hardship. – Is defined by States and submitted to HFCA for approval as plan policy.

3261 INCOME ELIGIBILITY

3261.1 Income Eligibility Determinations for Institutionalized Members of Couples –
When first determining eligibility:

- Use plan policies not governed by §1924 to define ownership in income.

- Do not deem income from a community spouse to an institutionalized spouse for any month of institutionalization.

- Compare institutionalized spouses' income after applying deductions specified in the plan to the appropriate eligibility standards for one person (i.e., categorically needy or medically needy).

Beginning with the first regularly scheduled redetermination of eligibility under 42 CFR §435.916 use the following rules governing couples' ownership in income to determine institutionalized persons' income eligibility, irrespective of State laws governing community property

or division of marital property. These rules apply as follows:

* * *

3240.4 More Restrictive Methods Prohibited Under This Option – Unless it is specifically authorized under the Medicaid statute (e.g., you have elected the option under §1902(f) of the Act to use more restrictive eligibility requirements), you may not use income or resource methods that are more restrictive than those used under the most closely related cash assistance program. A method is more restrictive if any individual who is otherwise eligible under the rules of the most closely related cash assistance program is ineligible under your alternative method. Therefore, do not employ a policy which, although it may result in a more liberal application of policy in some instances, results in denying Medicaid to persons who are eligible if the equivalent cash assistance rule is used to determine eligibility.

EXAMPLE: A policy defines a couple, for purposes of determining eligibility in SSI States, as persons who are legally married. This is a more limited definition than that used under the SSI program, which also includes, under the definition of couples, persons who are not legally married but hold themselves out to the community to be husband and wife.

Under the proposed alternative policy, couples who are not legally married, but hold themselves out to the community to be husband and wife, are considered as individuals for purposes of determining their Medicaid eligibility. Therefore, separate income and resource standards are used to determine eligibility rather than the standards for couples, which are lower than two times the individual standards.

Use of the higher separate standards is advantageous to some couples, e.g., in cases where one member of a couple has a higher income and the combined income of the couple exceeds the couple standard. Under the alternative policy, one member of the couple is eligible. However, in other cases, the couple may be ineligible when the alternative policy is applied, but eligible if the SSI policy were applied, e.g., in cases where the combined income and resources are below the couple standard.

3240.5 Federal Financial Participation Levels. – In order to receive FFP for services provided to recipients under your plan, place limits on the income of those individuals and families. There are two separate limits which apply to the eligibility groups for whom you may employ more liberal income methods. (There are no FFP limits on resources held by recipients.)

Adhere to the following descriptions of the maximum income limits in developing your eligibility plan policies.

A. The 133 and 1/3 Percent Limit. – This income limit applies to the medically needy and to most other Medicaid only eligibility groups (including AFDC-related categorically needy groups) except those subject to the 300 percent limit described below, and the groups described in §3240.6. The AFDC program has a separate income threshold test that is equal to 185% of the AFDC need standard. You are not required to use the 185% income

test for AFDC-related categorically needy eligibility groups, but may apply it provided Medicaid FFP limits are not exceeded.

The 133 and 1/3% FFP limit with respect to any family is an amount (minus appropriate cash assistance deductions and incurred medical and remedial care expenses) which does not exceed a standard that is equal to 133 1/3 percent of the highest amount that ordinarily is paid to an AFDC family of the same size that has no countable income. Income deductions for purposes of defining countable income are limited to those of the cash assistance programs. More liberal deductions authorized under §1902(r)(2) of the Act are not deducted for this purpose.

Families for this purpose include all persons living in the home who are applying for Medicaid and who would be in the same family unit for purposes of determining AFDC eligibility whether or not the family is AFDC-related. Families always include financially responsible relatives living in the home, unless such relatives are receiving SSI benefits. This same family configuration applies to families including aged, blind and disabled, as well as AFDC-related families.

If your AFDC plan specifies a maximum family size beyond which there is no increase in benefits, determine income standards for families exceeding that maximum by adding an amount for each individual family member beyond the maximum. The amounts added must be reasonably related to amounts by which your AFDC plan increases benefits per additional family member up to the maximum size.

B. The 300 Percent Limit. – This income limit applies to persons receiving optional State supplements, those who are eligible for State supplements, those who would be eligible for State supplements if they were not in medical institutions, and institutionalized individuals who are eligible under State established special income levels. These groups are described in §§1902(a)(10)(A)(ii)(IV), (V) and (XI) of the Act. Although not specifically identified in the statute, the income limit also applies to groups in §§1902(a)(10)(A)(ii)(VI) and (VII). This is because members of these groups derive their eligibility by virtue of the eligibility rules of groups which are subject to the 300% limit. This includes individuals who are receiving home and community-based services under a waiver or hospice care who would be eligible if they were in a medical institution.

Under this provision, FFP is not available for services rendered to individuals whose income (without regard to the exclusions of income described in §1612(b) of the Act) exceeds 300% of the Federal Benefit Rate (FBR) for an individual under §1611(b)(1) of the Act.

Cases in which *Blumer* Increased the Community Spouse Resource Share
As of September 30, 2001

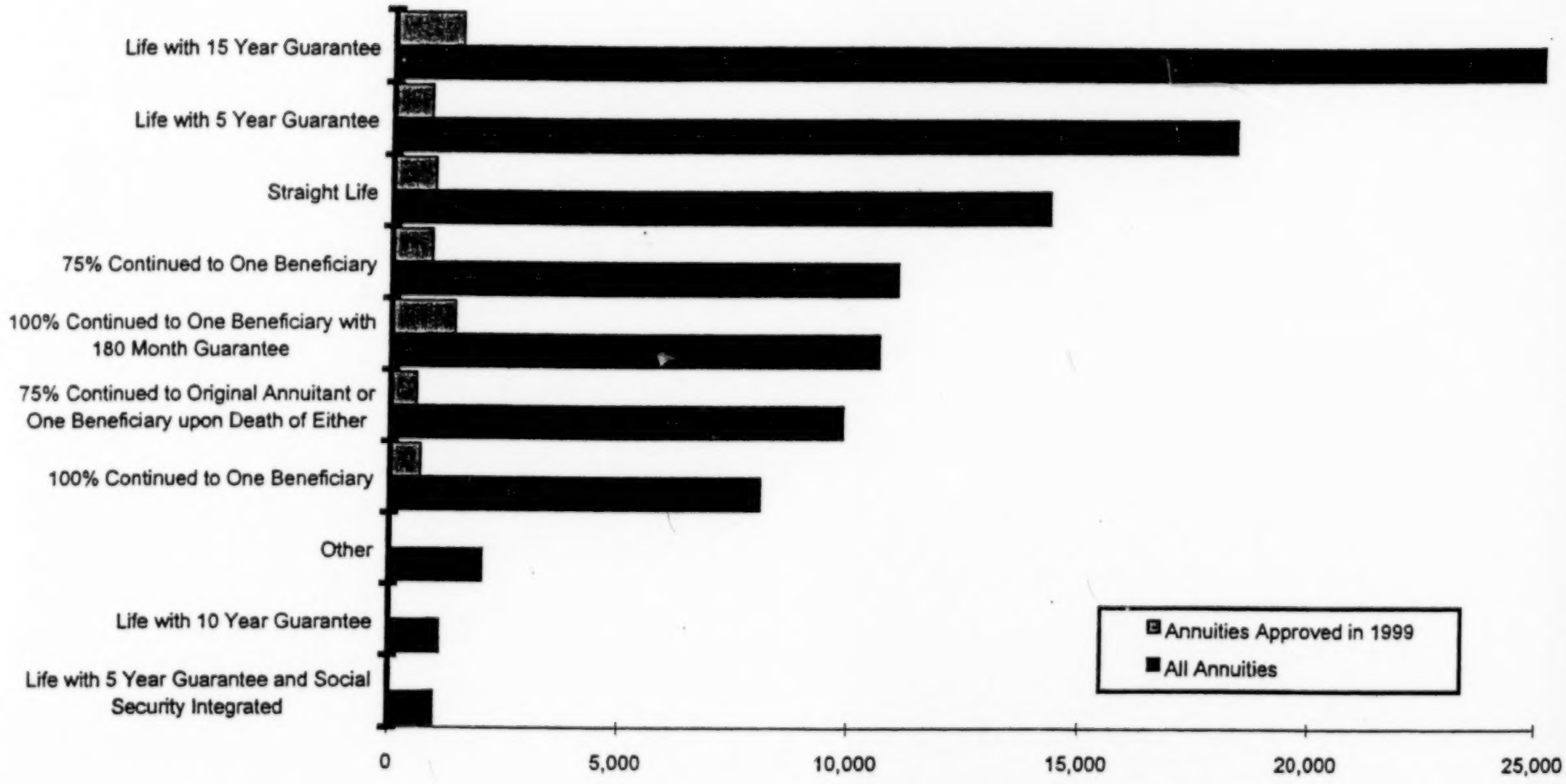
		Community Spouse Resource Share	
DHA Case No.	Couple's Resources	Without **Blumer**	**Blumer** Increase
MRA-09/ 47931	$64,137	$52,000	$12,137
MRA-44/ 47850	$137,113	$73,597	$63,516
MRA-70/ 49065	$127,309	$89,000	$38,309
MRA-70/ 48333	$108,967	$56,483	$52,484
MRA-70/ 47970	$107,408	$55,704	$51,704
MRA-44/ 49009	$136,882	$70,176	$66,706
MRA-25/ 48984	$131,209	$67,604	$63,605
MRA-22/ 48798	$118,490	$58,423	$60,067
MRA-11/ 47906	$195,715	$86,120	$109,595
MRA-67/ 49302	$134,328	$73,201	$61,127
Totals	$1,261,558	$682,308	$579,250

Wisconsin
Department of Employe [sic] Trust Funds
Eric O. Stanchfield
Secretary
[SEAL]

Comprehensive
Annual
Financial
Report
1999

801 West Badger Road
P. O. Box 7931
Madison, WI 53707-7931

Annuities by Payment Option



App. 11

Wisconsin
Nursing Homes
and
Facilities for the Developmentally Disabled
1999

November 2000

Bureau of Health Information
Division of Health Care Financing
Department of Health and Family Services

Table 13. Primary Pay Source at Admission for Nursing Home Residents, Wisconsin 1990-1999

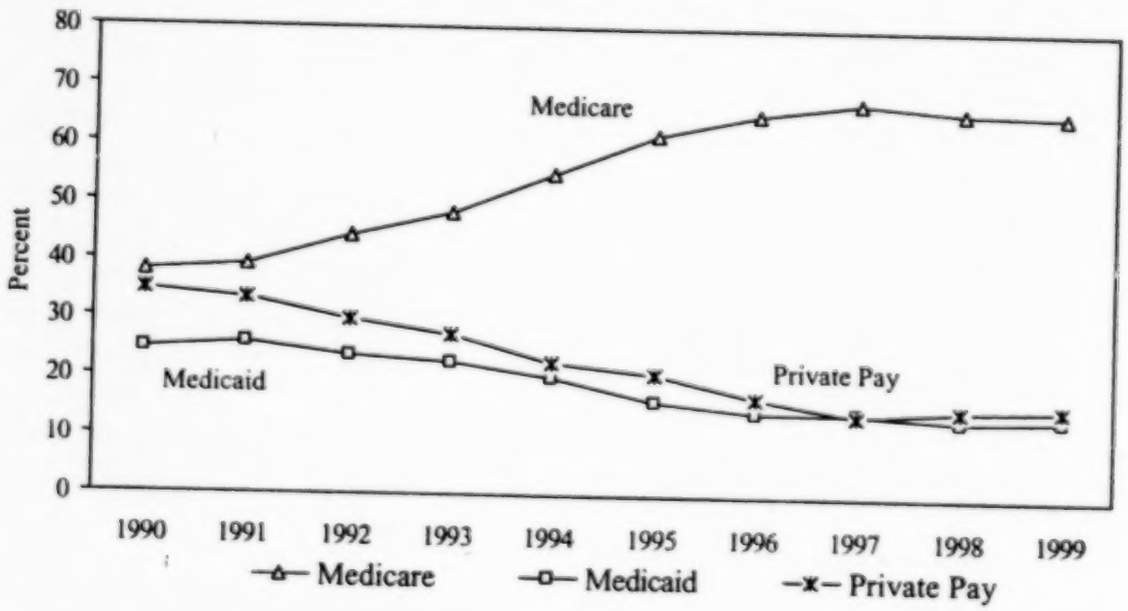
Year	Primary Pay Source at Admission					Total Admissions
	Medicare	Medicaid	Private Pay	Managed Care	Other Sources	
1990	10,271	6,727	9,382	---	635	27,015
1991	11,258	7,454	9,604	---	473	28,789
1992	13,329	7,111	8,961	---	778	30,179
1993	14,846	6,973	8,473	---	679	30,971
1994	19,863	7,287	8,231	---	840	36,221
1995	24,250	6,326	8,148	---	479	39,203
1996	28,326	6,296	7,392	725	744	43,483
1997	33,115	6,988	6,892	1,164	891	49,050
1998	34,214	6,880	7,750	1,811	540	51,195
1999	33,601	7,030	7,808	2,223	524	51,186

Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

Notes: Managed care plans were not asked about as a separate pay source until 1996.
The category "Other Sources" includes mostly residents whose primary pay source was the Department of Veterans Affairs.
Totals include residents whose primary pay source at admission was not reported.

App. 12

Figure 4. Primary Pay Source at Admission, Wisconsin 1990-1999



Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

- Medicare was the primary pay source at admission for 66 percent of nursing home residents admitted in 1999, down from 68 percent in 1997. As primary sources of payment at admission, private pay and Medicaid have remained stable at about 14 to 15 percent each year since 1997.

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Table 23. Age of Nursing Home Residents by Licensure Category, Wisconsin, December 31, 1999

	Licensure Category					
	SNFs/ICFs		IMDs		Total	
Age of Resident	Number	Percent	Number	Percent	Number	Percent
Less than 20 years	13	0%	2	1%	15	0%
20-54 years	1,172	3	138	48	1,310	3
55-64 years	1,486	4	44	15	1,530	4
65-74 years	4,173	11	51	18	4,224	11
75-84 years	12,881	33	34	12	12,915	33
85-94 years	16,189	41	14	5	16,203	41
95+ years	3,519	9	3	1	3,522	9
All ages	39,433	100%	286	100%	39,719	100%
65+ years	36,762	93%	102	36%	36,864	93%
85+ years	19,708	50%	17	6%	19,725	50%

Source: Annual Survey of Nursing Homes, Bureau of Health Information, Division of Health Care Financing, Department of Health and Family Services.

Notes: Percentages may not add to 100 percent due to rounding. SNFs are Skilled Nursing Facilities; ICFs are Intermediate Care Facilities; IMDs are Institutions for Mental Diseases.

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App. 15

PROFILE OF WISCONSIN
NURSING HOME RESIDENTS
1994

December 1995

Center for Health Statistics
Division of Health
Department of Health and Social Services

Table 4. Estimated Percent of SNF Residents by Marital Status and Age, Wisconsin 1994

Age Groups	Marital Status				
	Married	Single	Widowed	Divorced	Total
<55	16%	45%	3%	36%	100% (1,320)
55-64	28	30	17	25	100 (1,470)
65-74	32	21	28	19	100 (4,650)
75-84	28	11	53	7	100 (13,850)
85-94	13	9	74	4	100 (17,100)
95+	4	7	86	3	100 (5,670)
Total	20	13	59	8	100 (42,060)

A much higher percentage of male than female residents were married (38 percent versus 13 percent); conversely, 71 percent of females were widowed, compared to 29 percent of males (Figure 2 omitted). Within each successive age group, a larger percentage of females were widowed; among residents aged 85-94, for example, 81 percent of females and 48 percent of males were widowed.

Table 5. Estimated Percent of Married SNF Residents by Residence of Spouse, Wisconsin 1994

Location of Spouse	Male	Female	Total
In nursing home	18%	26%	21%
In community	75	65	71
Other	7	10	8
Total*	100 (4,730)	100 (3,790)	100 (8,520)

* Excludes married residents whose spouse's residence was unknown.